

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JEFFREY CHEN,

Plaintiff,

V.

CITY OF MEDINA, et al.,

Defendants.

C11-2119 TSZ

ORDER

THIS MATTER comes before the Court on defendants' motion for a new trial.

12 docket no. 361. Having reviewed all papers filed in support of and in opposition to the
13 motion,¹ and having heard the arguments of counsel,² the Court enters the following
14 order.

Background

In this action, plaintiff Jeffrey Chen, former chief of police for City of Medina,
brought several causes of action against City of Medina, City Manager Donna Hanson,

¹ By oral ruling, see Minutes (docket no. 407), defendants' motion, docket no. 400 at 7 n.14, to strike the Declaration of Jeffrey Chen, docket no. 391, was granted. Plaintiff's declaration contains information regarding his efforts to seek employment after the jury rendered its verdict in this case. Such information was not before the jury and is not appropriate for consideration on a motion for new trial.

² During the hearing on July 10, 2013, plaintiff's counsel objected to defendants' attorney's repackaging of the arguments presented in connection with defendants' motion for a new trial. Defendants' counsel did not, however, raise any new or untimely contentions, and plaintiff's counsel's complaint lacks merit.

1 and former Mayor Bret Jordan. As a result of the Court's rulings on dispositive motions,
 2 Jordan was dismissed as a defendant, Order (docket no. 209), and the only claims that
 3 survived for trial were plaintiff's claims of race and/or national origin discrimination
 4 under state and federal law and his claim of a substantive due process violation brought
 5 pursuant to 42 U.S.C. § 1983.³

6 After a two-week trial, a jury returned a verdict in favor of plaintiff on all of his
 7 remaining claims. With respect to plaintiff's federal law claims, the Court determined
 8 the amount of economic damages and issued Findings of Fact and Conclusions of Law
 9 ("FF&CL"). With regard to plaintiff's claim under the Washington Law Against
 10 Discrimination ("WLAD"), the jury awarded back pay (lost wages and lost benefits) in
 11 the amount of \$285,480. Verdict (docket no. 325). Based on plaintiff's concession that
 12 the jury's back pay calculation was not consistent with the evidence, the Court remitted
 13 the amount of back pay on plaintiff's WLAD claim to \$237,944. See FF&CL at n.3
 14 (docket no. 344). The jury also awarded \$1,650,000 in front pay on plaintiff's WLAD
 15 claim, \$100,000 in emotional harm damages on all of plaintiff's claims, and \$25,000 in
 16 punitive damages against Hanson on plaintiff's federal claims. See Verdict (docket
 17 no. 325). Defendants now move for a new trial.

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19 ³ The Court granted summary judgment against plaintiff on his various conspiracy claims, Order (docket
 20 no. 209), as well as on his hostile work environment, breach of employment policy, procedural due
 21 process, First Amendment, and "whistleblower" claims, Order (docket no. 251), and dismissed all of
 22 those causes of action with prejudice. To the extent plaintiff's counsel was arguing at the hearing on
 July 10, 2013, that the Court's Orders, docket nos. 209 & 251, dismissing most of plaintiff's claims
 somehow gave more credence to plaintiff's remaining discrimination and substantive due process claims,
 such contention is far from accurate. If anything, the lack of merit in the claims as to which defendants
 were granted summary judgment and plaintiff's shift from "whistleblower" accusations to allegations of
 racial animus undermine the strength of plaintiff's claims of discrimination.

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1 City of Medina operates under a council-manager form of government. The
2 council is comprised of seven at-large members, one of whom is selected to serve as
3 mayor for a two-year term. The council selects a city manager, who is imbued with
4 various “powers and duties,” including the authority to appoint and remove department
5 heads, officers, and employees. RCW 35A.13.080. In particular, the chief of police is
6 appointed by and is under the “general supervision and control” of the city manager.
7 Medina Mun. Code § 2.16.030. When plaintiff first joined the Medina Police
8 Department in 2001, at the rank of captain, Michael Knapp was chief of police.
9 Tr. (Mar. 13, 2013) at 142:4-8. In 2004, after Knapp’s retirement, plaintiff was appointed
10 chief of police by then City Manager Douglas Schulze. *Id.* at 146:14-16. Hanson
11 became city manager in November 2008. *Id.* at 173:4-11. Jordan was a member of the
12 City Council from 2008 until 2011, and served as mayor from 2010 to 2011.
13 Tr. (Mar. 20, 2013) at 80:19-24.

14 Before Hanson became city manager in November 2008, City of Medina was
15 embroiled in various controversies, including the discharge in 2006 of Medina Police
16 Lieutenant Roger Skinner for stating *inter alia* that “Asians don’t make good managers,”
17 and the censure in October 2008 of Medina City Council member Lucius Biglow for
18 distributing an offensive parody written in the style of J.K. Rowling’s “Harry Potter”
19 books. Prior to trial, the Court excluded evidence concerning these discriminatory
20 comments because they could not be imputed to Hanson or City of Medina in light of,
21 respectively, the timing of events and the corrective action that had been taken. *See*
22 Order at 10-14 (docket no. 251); Minute Orders (docket nos. 239 & 265). The Court also
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1 excluded discriminatory remarks made by community members, including Henry
2 Paulman to whom the statement “I don’t talk to Orientals” is attributed, and Jordan to
3 whom the comment “I thought Asians had small ones” is ascribed at a time before he was
4 on the City Council or serving as mayor, because the declarant was not at the relevant
5 time an employee, a member of the City Council, or otherwise subject to City of
6 Medina’s or Hanson’s control. See id. During the course of trial, beginning with her
7 opening statement, plaintiff’s counsel Marianne Jones violated these and other rulings in
8 limine, and the jury was improperly exposed to evidence of racial animus that cannot, as
9 a matter of law, be used to hold either City of Medina or Hanson liable for
10 discrimination.

11 Putting aside the inappropriately proffered comments of individuals who were
12 disciplined for their behavior or with whom defendants have no privity, plaintiff’s
13 evidence of discrimination in this matter is virtually nonexistent. In connection with his
14 claim of discrimination on the basis of race and/or national origin, pursuant to the WLAD
15 and 42 U.S.C. §§ 1981 and 1983, plaintiff alleged three different adverse employment
16 actions: (i) being forced to resign on December 17, 2010; (ii) being placed on paid
17 administrative leave on December 27, 2010, after attempting to rescind the resignation;
18 and (iii) being terminated on April 27, 2011.

19 Approximately two months before this sequence of alleged adverse employment
20 actions, Central Services Director and City Clerk Rachel Baker was informed that, during
21 October 2010, a City of Medina employee, Craig Fischer, had been improperly accessing
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1 City of Medina's e-mail archive system known as MX Logic.⁴ Tr. (Mar. 19, 2013) at
 2 3:24-4:8, 12:23-13:6, 13:20-24. Having learned this information from an information
 3 technology consultant to whom Fischer had confided about his behavior, *id.* at 12:23-
 4 13:6, Baker investigated and discovered that, in addition to Fischer, one or more
 5 unknown individuals were accessing the MX Logic system with a username
 6 (*i.e.*, "rachel_prr") that belonged to Baker but that she no longer used, *id.* at 14:10-22.
 7 Baker advised Hanson of the situation, *id.* at 14:15, and Nathan Way, a senior network
 8 engineer and co-owner of a company known as Datanode LLC, was retained to
 9 investigate. Tr. (Mar. 21, 2013) at 181:1-4, 181:16-182:2.

10 Way's task was to identify the Internet protocol ("IP") addresses outside city hall
 11 that were being used to access the e-mail archive. *See id.* at 185:24-187:18, 195:20-
 12 196:2; *see also id.* at 196:14-16. Way's investigation revealed ten different IP addresses
 13 outside city hall, including the Medina Police Department network, through which the
 14 MX Logic system was accessed during a two-week period in October 2010. Ex. 1052
 15 (copy filed as Ex. BB to Holt Decl. (docket no. 158-3)); Tr. (Mar. 21, 2013) at 188:17-
 16 189:2, 194:13-18. Using publicly available "reverse Domain Name System" information,
 17 Way was able to determine which Internet service provider ("ISP") was associated with
 18 each IP address he had identified, *see* Ex. 1052 at Apps. A-J, and he recommended that

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 20 ⁴ Fischer is City of Medina's information systems coordinator. Tr. (Mar. 12, 2013) at 176:10. Fischer
 21 has unlimited access to City of Medina's e-mail archive. *Id.* at 183:19. While on paternity leave, as a
 22 result of his concern that his position might be cut for budget reasons, Fischer used the MX Logic system
 23 to view e-mails that were not directed to him. *Id.* at 184:7-11, 188:10-18, 189:2-6, 190:17-19, 192:1-15.
 At trial, Fischer testified that, although he has access to the e-mail archive for work-related reasons, his
 review of e-mails that did not contain his name in the "to," "cc," or "bcc" line was improper. *Id.* at
 178:25-179:15, 181:25-183:3, 185:24-186:14, 201:6-12.

1 subpoenas be issued to the respective ISPs, namely Comcast, Issaquah Highlands Fiber
2 Network, and Isomedia, see id. at 5,⁵ to ascertain which of their subscribers were
3 associated with the various IP addresses. Tr. (Mar. 21, 2013) at 187:12-18. According to
4 Dan Yourkoski, who was a lieutenant when plaintiff was chief of police and who became
5 acting chief of police when plaintiff resigned, the only way to obtain a subpoena or
6 search warrant for an ISP's subscriber records was to initiate a criminal investigation.
7 Tr. (Mar. 12, 2013) at 148:4-7, 149:2-5. Because, however, the Office of the United
8 States Attorney for the Western District of Washington decided not to pursue a criminal
9 investigation, City of Medina was unable to procure a subpoena or search warrant to
10 assist in identifying who had used the external IP addresses enumerated in Way's report
11 to access the e-mail archive.

12 A copy of Way's report was forwarded to attorney Michael Bolasina, who was
13 retained by City of Medina to provide legal advice concerning the unauthorized use of the
14 e-mail archive. Tr. (Mar. 19, 2013) at 48:18-50:1. Way's report indicated that
15 "rachel_prr" had been used to log into the MX Logic system from three external IP
16 addresses, namely from the Medina Police Department network and from the computers
17 of Clearwire and Comcast subscribers. Id. at 48:25-49:6; see also Tr. (Mar. 21, 2013) at
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⁵ Way did not make a similar recommendation concerning the ISP associated with two IP addresses
21 beginning with the numbers 184.77 and 184.78 because the ISP, namely Clearwire, does not maintain the
22 records necessary to identify the subscriber for more than seven days, and that amount of time had already
23 elapsed between the questionable access to the MX Logic system and the issuance of Way's report. See
Ex. 1052 at 19.

1 186:22-187:2. Bolasina was informed that, in 2009, Baker had given the username
2 "rachel_prr" and associated password to plaintiff.⁶ Tr. (Mar. 19, 2013) at 49:3-9.

3 On December 8, 2010, Bolasina interviewed Fischer about accessing the
4 MX Logic system. *Id.* at 60:9-11. Fischer admitted logging into the e-mail archive from
5 an external IP address, while he was on paternity leave, but indicated that he did not do
6 so from either the Medina Police Department network or the IP addresses associated with
7 Clearwire and Comcast. *Id.* at 61:5-13, 62:8-16.

8 On December 15, 2010, accompanied by Baker, Bolasina interviewed plaintiff.
9 *Id.* at 62:19-20; 63:3-4. According to Bolasina, after Bolasina explained to plaintiff that
10 he was investigating unauthorized access to the MX Logic system during October 2010
11 from three points, *i.e.*, the Medina Police Department network and the Clearwire and
12 Comcast IP addresses, plaintiff volunteered that he did not have a username or password
13 for the e-mail archive. *Id.* at 64:11-20. At trial, Bolasina testified that, because he was
14 concerned he was not clearly communicating with plaintiff, he paused and expressed his
15 understanding that, sometime during the previous year, Baker had given a username and
16 password to plaintiff; in response, plaintiff denied ever receiving a username and
17 password from Baker. *Id.* at 65:6-18, 83:17-84:21, 88:15-89:18.

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20 ⁶ At trial, Baker explained that, after business hours one evening in 2009, plaintiff approached her,
21 indicated that he was conducting an investigation, and asked for immediate access to the e-mail archive.
Tr. (Mar. 19, 2013) at 10:6-15. Baker was uncomfortable with plaintiff's request and she hesitated, but
22 she eventually gave plaintiff her own user name and password for the MX Logic system. *Id.* at 10:16-
11:3, 12:9-12.

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After the interview, Bolasina prepared a draft written statement memorializing his understanding of plaintiff's interview responses, and he e-mailed a copy to plaintiff for review and comment. *Id.* at 68:16-71:2; *see* Ex. 1102; *see also* Ex. 173. The draft written statement contained a denial that plaintiff had ever been supplied a username or password for the MX Logic system and a denial that plaintiff had ever accessed the e-mail archive for any reason. Ex. 1102 (copy filed as Ex. EE to Holt Decl. (docket no. 158-4)).⁷ Plaintiff did not immediately respond to Bolasina's e-mail. Tr. (Mar. 19, 2013) at 72:1-8. Instead, two days later, on December 17, 2010, during a meeting in Hanson's office, plaintiff tendered a letter of resignation as City of Medina's chief of police. Ex. 182. At trial, plaintiff and Hanson provided vastly different accounts of what transpired during the meeting on December 17, 2010. Six days later, on December 23, 2010, plaintiff sent Hanson a letter rescinding his resignation. Ex. 213. On December 27, 2010, plaintiff was placed on paid administrative leave. Ex. 221.

Following an investigation conducted by attorney Ellen Lenhart, see Ex. 1074, and a pre-termination hearing as contemplated in *Cleveland Bd. of Educ. v. Loudermill*, 470

⁷ The draft written statement contained the following two paragraphs:

6. Mr. Bolasina said that he was under the impression that I had been given, at some time in the past, the log in “Rachel_prr” and a password in order to review emails in the City’s email archive. I clarified that this was incorrect. I have never been given a log in or password to the City’s email archive at any time, for any reason.

8. As I told Mr. Bolasina, I have never accessed the City's email archive for any reason. Nor have I used a log in or password for the City's email archive for any purpose whatsoever. None of the accesses of the City's email archive using the Comcast account, the police department network, and the Clearwire wireless network, have anything to do with me.

Ex. 1102.

1 U.S. 532 (1985), *see* Ex. 364, plaintiff was discharged by Hanson on April 27, 2011, via
2 written notice identifying six reasons for the decision, including making false statements
3 to Bolasina and Lenhart, *see* Ex. 385. This litigation commenced near the end of 2011,
4 and trial concluded with a verdict on March 26, 2013. The Court entered judgment,
5 docket no. 345, on April 9, 2013. Defendants filed a timely motion for judgment as a
6 matter of law, which was denied, *see* Minute Order (docket no. 406), and a concurrent
7 alternative motion for a new trial, docket no. 361, which is hereby GRANTED for the
8 reasons set forth below.

9 **Discussion**

10 A trial judge is ultimately responsible for the conduct of the litigation and for
11 ensuring that a party is not a victim of a miscarriage of justice. *Murphy v. City of Long*
12 *Beach*, 914 F.2d 183, 187 (9th Cir. 1990). To enable the trial court to discharge this
13 important duty, the Federal Rules of Civil Procedure authorize the Court to grant a new
14 trial, either upon a party's motion or *sua sponte*. *See* Fed. R. Civ. P. 59(a)(1)(A) & (d);
15 *see also Murphy*, 914 F.2d at 187. A new trial may be ordered for a variety of reasons,
16 including (i) a verdict contrary to the great weight of the evidence, *Rattray v. City of*
17 *Nat'l City*, 51 F.3d 793, 800 (9th Cir. 1994); (ii) an excessive jury award, *Hanson v. Shell*
18 *Oil Co.*, 541 F.2d 1352, 1359, 1360-61 (9th Cir. 1976); (iii) attorney misconduct during
19 trial, *Anheuser-Busch, Inc. v. Natural Beverage Distrib.,* 69 F.3d 337, 346 (9th Cir.
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1 1995); and (iv) evidentiary and/or instructional error affecting a party's substantial rights,
 2 see Fed. R. Civ. P. 61⁸; see also Murphy, 914 F.2d at 187 & n.7.

3 The undersigned judge has a deep respect for the jury process and, in twenty-five
 4 years on the bench, has never granted a new trial (as opposed to a remittitur with the
 5 option of a new trial). The prospect of enduring a retrial of this matter is not a pleasing
 6 one, and the decision has not been made lightly or improvidently. The undersigned judge
 7 was completely surprised by the jury verdict in this case, and can only conclude that it
 8 was the product of passion and/or prejudice. Having carefully reviewed the entire trial
 9 transcript, which was provided to the Court by the court reporter, the Court concludes
 10 that at least three of the four independent grounds described above are present in this
 11 case, and the Court is left with the firm conviction that a new trial is required to prevent a
 12 miscarriage of justice.

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15 ⁸ In their motion for a new trial, defendants alluded to the Court's exclusion of evidence concerning
 plaintiff's settlement with his prior employer, the Seattle Police Department ("SPD"), and the reasons
 underlying plaintiff's resignation from SPD as a basis for ordering a new trial. Defendants, however, did
 not develop this argument in the legal analysis section of their motion or in their reply, and they did not
 even mention it during their initial argument at the hearing on July 10, 2013. The SPD evidence was
 relevant as to both liability on the substantive due process claim and future damages on all claims,
 providing a reason other than defendants' actions for the difficulty that plaintiff has encountered in
 securing employment. The Court, however, deemed the SPD evidence to be more prejudicial than
 probative, particularly given that, before plaintiff was appointed chief of police, City of Medina was
 aware of the underlying facts giving rise to SPD's investigation, which was initiated prior to, but
 abandoned after, plaintiff's resignation from SPD. See Fed. R. Evid. 403. In their motion for a new trial,
 defendants have not indicated why, even assuming the SPD evidence should have been admitted, justice
 would require a new trial on that basis. See Fed. R. Civ. P. 61. In light of the Court's ruling regarding the
 other grounds for a new trial, the Court declines to further consider whether any evidentiary error would
 also justify a new trial. Prior to another trial of this matter, however, the Court will address whether the
 case should be bifurcated, with liability on the discrimination claims tried first, and liability on the
 substantive due process claim and damages tried subsequently, and whether the SPD evidence should be
 allowed during the second, but not the first, phase of the trial.

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1 A. **Verdict Contrary to Evidence**

2 Although the existence of substantial evidence to support a jury verdict precludes
 3 the Court from granting judgment as a matter of law (“JMOL”), it does not prevent the
 4 Court from ordering a new trial if the verdict is against the clear weight of the evidence.
 5 Landes Constr. Co. v. Royal Bank of Canada, 833 F.2d 1365, 1371 (9th Cir. 1987).
 6 Unlike in the JMOL context, with respect to a new trial motion, the Court need not view
 7 the evidence in the light most favorable to the non-moving party. Id. Instead, in deciding
 8 whether to grant a new trial, the Court may, and indeed has a duty to, weigh the evidence
 9 and assess the credibility of the witnesses.⁹ Id.; see Molski v. M.J. Cable, Inc., 481 F.3d
 10 724, 729 (9th Cir. 2007) (quoting Murphy v. City of Long Beach, 914 F.2d 183, 187 (9th
 11 Cir. 1990) (quoting Moist Cold Refrigerator Co. v. Lou Johnson Co., 249 F.2d 246, 256
 12 (9th Cir. 1957))). The Court’s inquiry is whether, giving full respect to the jury’s

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 14 ⁹ Plaintiff incorrectly contends that the following standard applies:

15 The inferences to be drawn from the evidence are for the jury and not for this court. The
 16 credibility of witnesses and the weight to be given to the evidence are matters within the
 17 province of the jury and even if convinced that a wrong verdict has been rendered, the
reviewing court will not substitute its judgment for that of the jury, so long as there was
 18 evidence which, if believed, would support the verdict rendered.

19 Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 511 (9th Cir. 2000) (emphasis
 20 added) (quoting Herring v. Dep’t of Soc. & Health Servs., 81 Wn. App. 1, 16-17, 914 P.2d 67 (1996)
 21 (quoting Burnside v. Simpson Paper Co., 123 Wn.2d 93, 108, 864 P.2d 937 (1994) (quoting State v.
O’Connell, 83 Wn.2d 797, 839, 523 P.2d 872 (1974)))). Contrary to plaintiff’s assertion, the standard
 22 described in Passantino does not govern on a motion for a new trial, but rather applies to an appellate
 23 court’s review of a jury’s verdict. In O’Connell, from which the above language stems, the Washington
 Supreme Court decided a case in which the trial court had denied motions for judgment notwithstanding
 the verdict and for a new trial, leaving “the verdict of the jury . . . before us, reinforced by the trial judge’s
 approval, or, if not approval, his recognition that there is no reason why the verdict should be set aside.”
 83 Wn.2d at 839. Likewise, in Passantino, on which plaintiff relies, the Ninth Circuit was articulating the
 doctrines related to its review of the jury’s verdict, the trial court having denied the defendant’s motion
 for judgment as a matter of law or in the alternative for a new trial. 212 F.3d at 504.

1 findings and considering all of the evidence, the Court is left with “the definite and firm
 2 conviction that a mistake has been committed.” *Landes Constr.*, 833 F.2d at 1371; *see* 11
 3 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, FED. PRAC. & PROC. § 2806
 4 & n.26 (3d ed. 2012) (citing *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)
 5 (applying a similar test for when a reviewing court may upset a trial court’s finding of
 6 fact in a nonjury case)).

7 In evaluating whether a new trial is warranted in this case, the Court must consider
 8 whether any of the following jury findings are against the great weight of the evidence:
 9 (i) that plaintiff was compelled by Hanson to resign; (ii) that race and/or national origin
 10 was a substantial factor¹⁰ in the adverse employment actions at issue; and (iii) that
 11 defendants would not have engaged in the same adverse employment actions even if race
 12 and/or national origin had played no role in the decisions. The Court is mindful that, with
 13 respect to the first two inquiries, plaintiff had the burden of proof by a preponderance of
 14 the evidence, while as to the third issue, defendants were required to demonstrate, by
 15 clear and convincing evidence as to the state law claim and a preponderance of the
 16 evidence as to the federal law claims, that their employment decisions would have been
 17 the same if premised solely on one or more legitimate, non-discriminatory reasons. *See*

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 19 ¹⁰ Pursuant to the agreement of counsel, the jury was instructed that, to prevail on his WLAD, § 1981, and
 20 § 1983 claims, plaintiff was required to prove by a preponderance of the evidence that race and/or
 21 national origin was a “substantial factor,” as opposed to a “motivating factor,” in the decision to engage in
 22 the adverse employment action at issue. *See* Minute Order at 2 n.1 (docket no. 318); Instr. Nos. 12, 13, &
 23 14 (docket no. 321); *see also* Wash. Pattern Instr. (“WPI”) 330.01 (“substantial factor”); 9th Cir. Model
 24 Instr. 10.1C (“motivating factor”). A “substantial factor” means a significant motivating factor, but does
 25 not mean the only or even the main factor in bringing about the adverse employment action. *See*
 26 WPI 330.01.01; *see also* *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 72-75, 821 P.2d 18
 27 (1991).

1 Ex. A to Minute Order (docket no. 277 at 24 & 26) (discussing *Davis v. Dep't of Labor &*
 2 *Indus.*, 94 Wn.2d 119, 615 P.2d 1279 (1980); *Metoyer v. Chassman*, 504 F.3d 919 (9th
 3 Cir. 2007); *Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169 (9th Cir. 1998)).

4 **1. Forced Resignation**

5 With respect to the allegedly forced resignation, plaintiff and Hanson have offered
 6 vastly different accounts of the events of December 17, 2010. According to plaintiff,
 7 after a heated argument with Hanson about whether plaintiff had authority to access City
 8 of Medina's e-mail archive, Hanson said to plaintiff, "I've got the support of the Mayor,
 9 and I could fire you right now." Tr. (Mar. 14, 2013) at 95:21-96:11. Plaintiff testified
 10 that Hanson then gave him an ultimatum: "Do you want to get fired, or do you want to
 11 quit, or do you want to be put on admin[istrative] leave?" *Id.* at 96:21-23. Plaintiff
 12 indicated that, in an angry and emotionally hurt state, he grabbed a piece of paper from
 13 Hanson's printer and scrawled out a resignation letter. *Id.* at 97:1-5. He then took the
 14 resignation letter from Hanson's office, went back to his office and photocopied it, and
 15 returned to Hanson's office with various items, including keys and badges. *Id.* at 97:13-
 16 99:17.

17 In contrast, Hanson testified that plaintiff arrived at her office in the afternoon on
 18 December 17, 2010, with two envelopes of different sizes. Tr. (Mar. 20, 2013) at 153:16-
 19 24. Plaintiff handed Hanson both envelopes; the smaller envelope contained plaintiff's
 20 hand-written letter of resignation. *Id.* at 153:25-154:2. The letter undisputedly read:

21 I hereby tender my 2 week resignation effective December 31, 2010.
 22 I have chosen another opportunity to finish my working career.
 23 I wish you and the City of Medina the best in the future.

1 Ex. 182 (copy filed as Ex. HH to Holt Decl. (docket no. 158-4)). Hanson expressed
 2 “shock” at receiving plaintiff’s resignation. Tr. (Mar. 20, 2013) at 154:3. According to
 3 Hanson, plaintiff left her office and did not return. *Id.* at 154:10-20. After mentioning to
 4 Baker,¹¹ who was at the time with Bolasina, that plaintiff had just resigned, Hanson
 5 inventoried the contents of the larger envelope. *Id.* at 154:13-155:1. When asked at trial,
 6 Hanson indicated that, given the layout of her office, a person could not have grabbed
 7 paper from her printer as plaintiff had described, and she denied pressuring plaintiff into
 8 resigning. *Id.* at 155:20-156:4.

9 The Court had an opportunity to observe both plaintiff and Hanson while they
 10 testified. Of the two witnesses, plaintiff was by far the more polished and professional in
 11 demeanor. The Court, however, did not doubt Hanson’s credibility, and the jury’s verdict
 12 cannot be explained as merely declaring plaintiff the winner in a swearing match. Based
 13 solely on the substance and tenor of plaintiff’s resignation letter, which is inconsistent
 14 with his story about its creation, Hanson’s account of events cannot be discounted. The
 15 resignation letter indicated that “another opportunity” was plaintiff’s reason for leaving
 16 City of Medina and, in the letter, plaintiff wished Hanson well in the future. Language of
 17 this nature would not be expected to appear in a letter forged in the heat of the moment
 18 under the type of duress plaintiff alleged.

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 21 ¹¹ Baker testified that plaintiff came to Hanson’s office armed with a large envelope, was informed that
 22 Hanson was not in her office, and said he would come back later. Tr. (Mar. 19, 2013) at 21:16-22:16.
 23 Baker’s version corroborates Hanson’s account of events. Baker, however, was impeached by plaintiff’s
 24 counsel with deposition testimony indicating a lack of recollection about the envelope, *id.* at 27:13-30:7,
 25 and the Court therefore has not relied on Baker’s testimony on this particular point.

1 Similarly, an e-mail that plaintiff distributed shortly after his meeting with Hanson
2 on December 17, 2010, belies plaintiff's assertion of a compelled resignation. In the
3 e-mail, which was sent to all members of the Medina Police Department, plaintiff
4 indicated that he had "decided to pursue other opportunities" and had tendered his two-
5 week "notice of resignation" to Hanson. Ex. 8 to Lenhart Report, Ex. 1074; see also
6 Ex. 184. The representations made in the e-mail, contemporaneously with plaintiff's
7 resignation, are not consistent with his subsequent accusation that Hanson forced him to
8 resign.

9 Moreover, other witnesses who spoke with plaintiff shortly after his resignation
10 testified that plaintiff made no mention of any coercion by Hanson. Medina City Council
11 member Douglas Dicharry spoke with plaintiff about two weeks after his resignation, and
12 plaintiff explained that he "couldn't work with [Hanson]." Tr. (Mar. 15, 2013) at 138:24-
13 139:7. Rather than attributing the resignation to any ultimatum from Hanson, plaintiff
14 mentioned to Dicharry "something about [Hanson] wouldn't allow him to buy tires for
15 the police cars, and his officers -- he was concerned about officer safety and safety of the
16 community." Id. at 139:9-12. Plaintiff said nothing to Dicharry about a forced
17 resignation. Id. at 140:6-7. Likewise, Medina City Council member Katherine Phelps
18 indicated that, three to four days after his resignation, plaintiff told her that "he had
19 grown weary of working with Donna Hanson, . . . he had another opportunity to move on
20 to, and that's what he intended to do." Tr. (Mar. 20, 2013) at 62:13-18.

21 Jordan testified that he was "shocked" by plaintiff's allegation of a resignation
22 under pressure from Hanson because it "didn't line up with what we talked about in our
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1 telephone conversation,” which had occurred three or four days after plaintiff resigned.
2 *Id.* at 89:3-15, 92:21-93:6. Jordan further indicated that he could not understand what
3 leverage Hanson could possibly have had over plaintiff to force him to resign. *Id.* at
4 99:19-100:7. Jordan believed that Hanson knew plaintiff had more support in the City
5 Council than she did, and that Hanson understood she would “be fired before our chief
6 will.” *Id.* Jordan summed up the situation by stating that “the only thing we couldn’t
7 protect him from was his own choice to resign.” *Id.* at 99:25-100:1. This information is
8 consistent with what Hanson told attorney Bolasina sometime prior to plaintiff’s
9 resignation, namely that even if she discovered plaintiff had been accessing the
10 MX Logic system inappropriately, she was “not in a position to discipline him because he
11 curries so much favor with the City Council and the citizens of Medina.” Tr. (Mar. 22,
12 2013) at 134:21-135:2.

13 Both Phelps and Jordan expressed dissatisfaction with Hanson’s performance as
14 city manager. Phelps desired stronger leadership, Tr. (Mar. 20, 2013) at 73:19-21, while
15 Jordan wanted Hanson to engage more with the community, *id.* at 87:19-20. Jordan
16 described Hanson as someone who was not “lighting the world on fire,” but who was
17 keeping the train “leaving the station on time every day.” *Id.* at 87:18-24. According to
18 Linda Crum, records manager for the Medina Police Department, plaintiff himself
19 assessed Hanson as weak, and plaintiff predicted, on Hanson’s first day as city manager,
20 that the City Council is “going to just be over her,” meaning that she would not last long.
21 Tr. (Mar. 13, 2013) at 33:13-15, 82:2-7. The Court’s observation of Hanson’s demeanor
22 while testifying is consistent with these evaluations; Hanson lacks the type of

1 assertiveness that might support plaintiff's claim that, on December 17, 2010, she gave
2 him an ultimatum culminating in his resignation.

3 During her closing statement, plaintiff's counsel argued that a voluntary
4 resignation was nonsensical in light of plaintiff's personal situation at the time, being
5 recently divorced, moving back into his home, having just regained custody of his four
6 children, on the eve of celebrating his daughter's 18th birthday, during the week before
7 Christmas. Tr. (Mar. 25, 2013) at 10:9-12. Counsel's analysis is actually stronger proof
8 of the opposite conclusion. Under plaintiff's version of events, he had the option to be
9 placed on paid administrative leave, which would have afforded him time to find other
10 employment, and given plaintiff's personal situation, his story that he instead impulsively
11 resigned runs contrary to the type of composed decision-making in stressful situations
12 that is expected of a highly-trained law enforcement officer having attained the rank of
13 chief of police. Hanson's account is far more believable because it, in contrast,
14 contemplates that, when plaintiff resigned, he actually had somewhere else to go and an
15 anticipated means of maintaining his home and caring for his family.

16 The record also contains evidence indicating plaintiff took steps in advance of his
17 meeting with Hanson on December 17, 2010, that were consistent with an intention to
18 voluntarily resign. He erased all of the data from the Outlook program on his work
19 computer and iPod Touch, reset his cellular telephone to its factory settings, posted an
20 employee-of-the-year plaque without the usual announcements and fanfare, and canceled
21 a staff meeting scheduled to take place after the date plaintiff resigned. Tr. (Mar. 22,
22 2013) at 67:22-71:25. Similarly, plaintiff's actions after his resignation are incompatible

1 with the claim that the decision was foisted on him. Within six days after his resignation,
2 plaintiff sent Hanson a letter indicating simply, “Upon reflection I hereby rescind my
3 resignation.” Ex. 213 (copy filed as Ex. LL to Holt Decl. (docket no. 158-4)). If, as
4 plaintiff asserts, Hanson had actually told him his options were to be fired, be placed on
5 leave, or resign, plaintiff’s subsequent letter seems preposterous; if Hanson had indeed
6 made clear that plaintiff would be removed one way or another, she could hardly be
7 expected to welcome him back less than a week later. The more reasonable explanation
8 is that Hanson never announced any ultimatum, and that plaintiff voluntarily quit and
9 then decided to return. The Court is persuaded the jury’s finding that plaintiff was forced
10 to resign is against the great weight of the evidence, and a new trial on at least this issue
11 is warranted.

12 **2. Substantial Factor**

13 Even if, however, the jury could have reasonably believed that Hanson forced
14 plaintiff to resign, plaintiff’s own testimony did not connect such action to plaintiff’s race
15 or national origin, but rather to a dispute over whether plaintiff was authorized to access
16 the MX Logic system. Tr. (Mar. 14, 2013) at 95:23-96:24. According to plaintiff,
17 Hanson accused him of having “unauthorized access into these MX Logic archives.” *Id.*
18 at 96:2-3. Plaintiff allegedly responded, “I have authorized access, you know that,” *id.* at
19 96:8, and Hanson “[v]ery sharply” did not agree, *id.* at 96:8-9. The heated conversation
20 “went downhill,” *id.* at 96:9, and plaintiff resigned. Nothing in plaintiff’s recounting of
21 the events of December 17, 2010, supports a finding that plaintiff’s allegedly compelled
22 resignation resulted from discrimination on the basis of race or national origin.

23

1 In attempting to portray Hanson as a racist and to hold City of Medina liable for
2 discrimination, plaintiff relied on four types of evidence: (i) two statements attributed to
3 Hanson, one of which she denied making; (ii) the statements of others, none of which can
4 be imputed to Hanson; (iii) Hanson's managerial decisions, including the disciplinary
5 treatment of two other Medina employees; and (iv) information allegedly withheld by
6 Hanson from investigators Way, Bolasina, and Lenhart. Each category of evidence will
7 be discussed seriatim.

8 a. Hanson's Statements

9 Plaintiff's case rests primarily on two statements ascribed to Hanson, one of which
10 is disputed, and neither of which are proximate in time to plaintiff's resignation,
11 placement on administrative leave, or termination. From the outset of Hanson's tenure as
12 city manager, beginning in November 2008, plaintiff viewed Hanson's behavior as
13 disrespectful, accusing her of regularly arriving 20 to 30 minutes late for staff meetings,
14 of disregarding him by not making "genuine eye contact" with him, and of ignoring him
15 by not asking for his input. Tr. (Mar. 14, 2013) at 45:19-47:5. In November 2009, after
16 Hanson had been city manager for approximately a year, during the course of a staff
17 meeting, Hanson asked, "Do you people eat turkey?" *Id.* at 49:6-10. According to
18 plaintiff, on this occasion, in contrast to others, Hanson looked straight at him when
19 posing the question. *Id.* at 49:9-10. Plaintiff interpreted the inquiry as being culturally
20 insensitive. *Id.* at 49:16-19.

21 Baker was also present during the meeting and recalled Hanson querying the
22 group about how they celebrate Thanksgiving and whether they ate turkey. Tr. (Mar. 19,
23

1 2013) at 25:14-16. Baker did not perceive the question as being directed toward plaintiff.
 2 *Id.* at 26:1-4. Baker believed Hanson was being sensitive to Baker's eating habits
 3 because she was, at the time, eating only raw vegan food, which did not include turkey.
 4 *Id.* at 25:19-21.

5 At trial, Hanson acknowledged inquiring, "Do you eat turkey for Thanksgiving?
 6 And if you don't, what do you do?" Tr. (Mar. 20, 2013) at 147:25-148:2. She explained
 7 that her daughter had started dating a young man whose family didn't like turkey. *Id.* at
 8 147:23-24. She thought that was "weird," because her family likes turkey, *id.* at 147:24-
 9 25, and she thereafter engaged in what she viewed as "casual conversation" concerning
 10 whether others enjoyed turkey, *id.* at 148:2-3. In closing argument, plaintiff's counsel
 11 seized on Hanson's use of the term "weird," asserting that Hanson "thinks she's normal,
 12 and everyone who is different, or different than her majority, her idea of the majority, is
 13 weird." Tr. (Mar. 25, 2013) at 19:3-5.

14 Even assuming such extrapolation was warranted, the underlying evidence does
 15 not demonstrate an animus based on race or national origin or provide any basis for
 16 liability on plaintiff's discrimination claims. As indicated by Baker's testimony, the
 17 decision not to ingest turkey, at Thanksgiving or otherwise, might have nothing to do
 18 with race or national origin, but could result from food preferences (vegan or vegetarian),
 19 aversions, or allergies. Moreover, the race-neutral question of turkey consumption was
 20 posed by Hanson over a year before plaintiff resigned, and it appears to have been an
 21 isolated event.

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1 The other remark attributed to Hanson on which plaintiff relied in accusing her of
2 being ethnocentric was allegedly made in March 2009. According to plaintiff, he was
3 seeking Hanson's approval on a particular project, and after not receiving any response to
4 numerous requests, he sought her out at her office. Tr. (Mar. 14, 2013) at 41:23-43:11.
5 During a short conversation, Hanson allegedly said to plaintiff, "I thought you Chinese
6 people were supposed to be more patient than this." *Id.* at 43:13-15.

7 Hanson denied making this comment or any other racially disparaging remark to
8 plaintiff. Tr. (Mar. 20, 2013) at 148:7-13. In evaluating whether plaintiff or Hanson is
9 more credible on the issue of whether this offensive comment was uttered, the Court has
10 considered their respective demeanors while testifying, as well as plaintiff's 7-page
11 memorandum to Hanson dated January 27, 2011, his 3-page e-mail to Medina City
12 Council members dated January 29, 2011, his 33-page written response to the report
13 generated by Ellen Lenhart, his 3-page written objection to the Loudermill hearing, and
14 his charge filed with the Washington State Human Rights Commission ("WSHRC").
15 See Exs. 270, 280, 376, 374 & 440 (copies filed as, respectively, Exs. 4 & 7 to Lenhart
16 Report, Ex. AAA to Holt Decl. (docket no. 158-5); Exs. DDD, FFF, & III to Holt Decl.
17 (docket no. 158-7)). Although Hanson was not a strong witness, the Court has no reason
18 to doubt her veracity. In contrast, plaintiff's pre-suit writings raise serious concerns
19 about his credibility.

20 In the two documents plaintiff generated in January 2011, which he sent to Hanson
21 and City Council members, respectively, he described himself as a "whistleblower,"
22 alleging that he had been targeted in retaliation for reporting Fischer's improper access to
23

1 the MX Logic system. In neither of the January 2011 writings did plaintiff allude to race
 2 or national origin as a perceived cause for the alleged adverse employment actions. In
 3 both his response to the Lenhart report and his objection to the Loudermill hearing,
 4 plaintiff described in detail the “do you eat turkey” incident, but he did not even mention
 5 the comment about “Chinese patience.” Likewise, in the charge filed with the WSHRC,
 6 in which plaintiff was required to explain why he believed the actions taken against him
 7 were discriminatory, he referred only to the “do you eat turkey” inquiry. The fact that the
 8 “Chinese patience” remark was not included in plaintiff’s lengthy pre-termination
 9 materials or in his WSHRC charge is evidence of fabrication. If Hanson had indeed
 10 made the ethnic slur, plaintiff would be expected to have remembered it and discussed it
 11 in one or more of these pre-litigation documents.¹² In sum, to the extent the jury found
 12 that the “do you eat turkey” statement was racist and/or that Hanson actually made the
 13 comment about “Chinese patience,” such findings are against the great weight of the
 14 evidence.

15 **b. Statements of Others**

16 As already discussed, plaintiff’s reliance on the offensive remarks of Skinner and
 17 Biglow, who were disciplined for their behavior, and of Paulman, who is not a City of
 18 Medina employee or otherwise under defendants’ control, was improper. With respect to
 19

20 ¹² During her closing argument, Jones indicated that Hanson “doesn’t remember saying” she thought
 21 “Chinese people were more patient than this.” Tr. (Mar. 25, 2013) at 17:20-24. By misstating the
 22 evidence, Jones avoided dealing with Hanson’s unequivocal contradiction of her client’s testimony.
 Counsel for defendants, however, confronted the issue directly in closing remarks, encouraging the jurors
 to study the aforementioned exhibits. *Id.* at 55:12-56:5.

1 Jordan, in addition to the improperly introduced comment attributed to him before he was
2 on the City Council or serving as mayor, plaintiff has placed particular emphasis on his
3 alleged use of the terms “cunts” and “runts,” while at a tavern outside City of Medina
4 limits. See Tr. (Mar. 18, 2013) at 39:4-13. At trial, Jordan admitted uttering a vulgarity
5 in the context of a story about someone who was passed over for selection as a police
6 officer by a short, heavyset woman who was permitted to go around a barrier rather than
7 surmount it in a physical test. Tr. (Mar. 20, 2013) at 95:21-96:6. Jordan, however,
8 denied employing the word “runt” or referring in any way to minorities while telling this
9 story. Id. at 95:16-19, 96:5-6. Plaintiff was not present at the time Jordan employed the
10 offensive term, and no evidence linked Jordan’s comments in any way to plaintiff.

11 Even assuming, however, that Jordan did reference “runts” or minorities within a
12 derogatory statement, the offensive conduct cannot be imputed to Hanson, who did not
13 participate in the discussion and might never have heard about it but for this litigation.
14 Moreover, the comment has no relevance to City of Medina’s liability, which was
15 premised solely on Hanson’s role as a final policymaker, see Instr. Nos. 13 & 14 (docket
16 no. 321), and not on Jordan’s position as mayor. Jordan did not participate in the adverse
17 employment actions at issue, and did not himself have authority to discharge plaintiff.
18 Order (docket no. 209); see also RCW 35A.13.080; Medina Mun. Code § 2.16.030.
19 Thus, Jordan’s use of vulgar or insensitive language does nothing to establish that race
20 and/or national origin was a substantial factor in plaintiff’s resignation, placement on
21 administrative leave, or termination.

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1 During trial, plaintiff also referred to discriminatory comments uttered by former
2 Chief Knapp, including Chen is “a regular Charlie Chan,” you can “never trust a smiling
3 Chinaman,” and “I bet those hands would be great for picking cotton.” Tr. (Mar. 11,
4 2013) at 9:23-10:7; Tr. (Mar. 14, 2013) at 172:2-15; Tr. (Mar. 25, 2013) at 19:21-20:1.
5 Knapp, however, retired long before Hanson became city manager, and plaintiff proffered
6 no evidence that Hanson even knows Knapp or was ever informed about his offensive
7 remarks prior to this litigation. Plaintiff instead sought to hold Hanson responsible for
8 these derogatory statements by alleging that Lieutenant Yourkoski repeated them to
9 plaintiff after Knapp retired. See id. Plaintiff still failed to link the statements to Hanson,
10 offering no basis to believe that Hanson was aware of Yourkoski’s behavior or had
11 condoned it. Indeed, to the extent Yourkoski acted inappropriately, the authority and
12 responsibility for disciplining him was vested in plaintiff, as Yourkoski’s supervisor, and
13 not Hanson. The Court holds that any influence the offensive remarks of individuals
14 other than Hanson might have had on the jury’s deliberations and its verdict was
15 improper.

16 c. Hanson’s Managerial Decisions

17 Plaintiff contends that four of Hanson’s managerial decisions demonstrate racial
18 animus on her part: (i) choosing someone other than plaintiff to serve as acting city
19 manager in her absence; (ii) identifying an area for improvement on plaintiff’s annual
20 performance evaluation; (iii) placing Craig Fischer on six months of probation for
21 improperly accessing the MX Logic system; and (iv) placing Jan Burdue on six months
22 of probation for submitting an inaccurate time sheet. Plaintiff’s argument lacks merit.
23

1 In January 2009, Hanson went on vacation and appointed Planning Director
2 Robert Grumbach to be acting city manager. Tr. (Mar. 14, 2013) at 30:1-6. According to
3 plaintiff, prior city managers had typically appointed him to serve as acting city manager
4 in their absence. *Id.* at 28:16-29:25, 31:15-17. The city manager, however, has
5 discretion to select anyone to be acting city manager. *Id.* at 31:13-14. Plaintiff provided
6 no evidence that Hanson was aware of the previous practice, and in fact indicated that
7 Hanson had not made any inquiry of him concerning how the situation had been handled
8 in the past. *Id.* at 32:5-7. At trial, Hanson explained that she chose Grumbach to serve as
9 acting city manager because he was familiar with the “business,” as opposed to the law
10 enforcement, side of City of Medina’s work, he was physically located in City Hall,
11 while others including plaintiff were not, and he was working on an ongoing cell tower
12 project. Tr. (Mar. 20, 2013) at 145:9-146:16. As plaintiff acknowledged at trial, Hanson
13 could appoint whoever she wanted, and Hanson provided legitimate, non-discriminatory
14 reasons for selecting Grumbach.

15 Also in January 2009, Hanson provided plaintiff a performance evaluation in
16 which she indicated, as an area for improvement, that plaintiff’s “enthusiasm also
17 sometimes comes across as frightening rather than reassuring to the public.”
18 Tr. (Mar. 14, 2013) at 36:10-14; *see* Ex. 90. According to plaintiff, Hanson’s support for
19 this statement was a complaint from a homeowner who was troubled by plaintiff’s yelling
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1 at the occupants of a truck that was blocking the roadway during a snowstorm.¹³
 2 Tr. (Mar. 14, 2013) at 39:10-18. In contrast, Hanson testified that she provided this
 3 feedback in relation to “E-lerts,” broadcasts by plaintiff’s department to the Medina
 4 community about safety, emergency preparedness, and crimes in the area, which she
 5 viewed as “a bit sensationalist” and perhaps causing more fear than necessary.
 6 Tr. (Mar. 20, 2013) at 143:8-144:5. Regardless of the basis for the partially negative
 7 evaluation, plaintiff offered no reason for concluding that it resulted from a
 8 discriminatory animus.

9 With respect to plaintiff’s “comparator” evidence, the Court considers it extremely
 10 weak. After his unauthorized use of the MX Logic system was revealed, Fischer received
 11 discipline in the form of six months of strictly monitored probation and the removal of
 12 several job duties. Tr. (Mar. 12, 2013) at 204:3-6, 207:23-208:3. Fischer is a member of
 13 a union, and his discipline was subject to the terms of a collective bargaining agreement.
 14

15 ¹³ In connection with the snowstorm, which occurred in December 2008, plaintiff sought additional
 16 compensation for 24 hours of work. Tr. (Mar. 14, 2013) at 23:6-24:8, 24:21-23. At trial, plaintiff
 17 testified that he perceived Hanson’s response to his request as disrespectful and lacking in empathy and
 18 compassion. *Id.* at 25:2, 26:13-14. According to plaintiff, Hanson told him that she would have to get
 19 approval from the City Council, *id.* at 25:7-8, and Hanson eventually informed him, “You got what you
 20 asked for,” *id.* at 26:25-27:1. The compensation was authorized by the City Council. *Id.* at 27:21.
 21 During her testimony, Hanson did not dispute the sequence of events, but explained that she “wasn’t
 22 familiar with department directors receiving overtime pay because they’re exempt employees,” meaning
 23 they work as many or as few hours as necessary for a fixed salary. Tr. (Mar. 20, 2013) at 142:2-8.
 Hanson indicated that plaintiff told her he had previously received overtime pay, so she agreed to and did
 take the request to the City Council. *Id.* at 142:9-12. The City Council approved the compensation
 related to the snowstorm, but the members “were also very clear that they didn’t want to see [any] more
 overtime requests.” *Id.* at 142:14-17. Plaintiff’s suggestion that this episode evidences racial animus is
 frivolous. At trial, plaintiff agreed that Hanson raised the issue of overtime with the City Council, as she
 assured him she would, and that he received the compensation he requested. Plaintiff’s lack of
 entitlement, as a salaried employee, to such compensation and Hanson’s approach of seeking approval
 from the City Council before authorizing any overtime pay had nothing to do with race or national origin.

1 See Tr. (Mar. 13, 2013) at 21:12-22:21. In contrast, plaintiff was an at-will employee.
2 See Order at 17-21 (docket no. 251). No allegation was ever made that Fischer lied to
3 Bolasina or anyone else about whether he had engaged in the improper use of the e-mail
4 archive. See Tr. (Mar. 19, 2013) at 61:5-16 (describing Fischer as “contrite” and stating
5 that Fischer “explained why he did it and he said that he felt that he was wrong when he
6 did it”). Plaintiff, however, was accused of lying to Bolasina by denying that Baker had
7 given him a username and password for the MX Logic system. Id. at 64:16-65:18, 80:24-
8 81:7. The Court found Bolasina’s testimony in this regard quite credible. Fischer and
9 plaintiff are simply not similarly situated.

10 Jan Burdue was the former finance director for City of Medina. Tr. (Mar. 20,
11 2013) at 180:10-12. She was disciplined for submitting a time sheet indicating that she
12 had served an entire day as a juror when she had actually been excused at 9:00 a.m.
13 Tr. (Mar. 21, 2013) at 35:1-23. Burdue received six months of probation as discipline for
14 this incident. Id. at 36:2-9. Burdue was subsequently terminated because of errors in
15 handling W2 forms for City of Medina employees. Id. at 37:18-21. Prior to her
16 discharge, Burdue was provided a Loudermill hearing and given an opportunity to tender
17 her resignation. Id. at 37:22-24, 41:9-12. She did not do so out of concern that she could
18 not then collect unemployment benefits. Ex. 135 at 18. Although Burdue apparently
19 misrepresented how the errors in the W2 forms came to her attention, id. at 6, no
20 evidence was presented that Burdue’s mishandling of the W2 forms involved any fraud
21 or dishonesty. Thus, Burdue was terminated on less severe allegations than those lodged

1 against plaintiff, and if anything, her discharge negates plaintiff's claim of discriminatory
 2 treatment.

3 **d. Withholding Information from Investigators**

4 Plaintiff's final attempt to show discriminatory animus involves information that
 5 plaintiff contends Hanson improperly withheld from investigators Way, Bolasina, and
 6 Lenhart.¹⁴ With regard to Way, plaintiff complains Hanson did not tell Way that plaintiff
 7 had been given the "rachel_prr" username for the MX Logic system. See Tr. (Mar. 21,
 8 2013) at 197:1-13. Plaintiff's criticism is frivolous. Even if Way had been advised that
 9 plaintiff possessed the "rachel_prr" username and related password, Way would have
 10 discovered the same external IP addresses and made the same recommendation; absent a
 11 subpoena or search warrant, Way could not have determined whether the IP addresses via
 12 which the MX Logic system had been accessed with the "rachel_prr" username belonged
 13 to plaintiff or someone else. Tr. (Mar. 21, 2013) at 187:16-22. Plaintiff's contentions
 14 that Way would have reached a different result if he had known plaintiff had been given
 15 the "rachel_prr" username, and that Hanson should have conveyed such information to
 16 Way, running an even greater risk of being accused of engaging in a "witch-hunt," lack
 17 any merit.

18 _____

19 ¹⁴ This argument is made in plaintiff's response to defendants' motion for JMOL, see Resp. at 6 (docket
 20 no. 393), which plaintiff incorporated by reference into his response to defendants' motion for a new trial,
see Resp. at 12 (docket no. 390). Plaintiff's response to the motion for JMOL contains ten pages of
 21 endnotes, which defendants moved to strike as violating the page limitations outlined in the Local Civil
 Rules. See Reply at 1 n.2 (docket no. 396). Plaintiff's counsel's use of endnotes, which appear outside
 22 the twelve-page limit, was improper, see Local Civil Rule 7(e)(6), but the Court declines to strike the
 contention regarding information allegedly withheld from investigators or the associated endnotes, W, X,
 23 and Y.

1 With respect to Bolasina, plaintiff laments that Hanson did not inform Bolasina
 2 she had instructed Yourkoski to tell King County Sheriff's Deputy William Marik to
 3 "proceed with a criminal trespass charge in this matter." Tr. (Mar. 19, 2013), at 95:4-7.¹⁵
 4 Plaintiff, however, presented no evidence that Hanson ever directed Yourkoski
 5 specifically to pursue a "criminal trespass charge." Hanson cannot be at fault for not
 6 telling Bolasina about something, namely a directive to "proceed with a criminal trespass
 7 charge," that no evidence in the record establishes occurred. Moreover, even if Hanson
 8 failed to mention that the charge she wanted to pursue was criminal trespass, such
 9 omission is not material and would not demonstrate any animus based on race or national
 10 origin. Finally, plaintiff's suggestion that Bolasina was somehow not fully apprised by
 11 Hanson about the attempted pursuit of subpoenas or search warrants through the initiation
 12 of a criminal investigation is ludicrous; Bolasina was the primary contact person for City
 13 of Medina after Marik was assigned to work on the matter.

14 As to Lenhart, in asserting that Hanson concealed information from her, plaintiff
 15 cites to a portion of Lenhart's trial testimony, but omits the crucial two questions and
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18 ¹⁵ Having been advised by Marik that, to obtain a subpoena or search warrant, a criminal investigation
 19 needed to be initiated, Tr. (Mar. 12, 2013) at 166:22-25, Yourkoski told Marik, after consulting with
 20 Hanson, that City of Medina wanted to commence a criminal investigation. *Id.* at 149:9-15, 166:9-16.
 21 Marik advised Yourkoski to contact one of four agencies, including the United States Secret Service. *Id.*
 22 at 165:9-166:16. Yourkoski did so, and about a week later, Marik received a telephone call from a Secret
 23 Service Assistant Special Agent in Charge, asking him to follow up on this matter in his capacity as a
 member of the Electronic Crimes Task Force, and providing to him Bolasina's contact information. *Id.* at
 162:22-163:15, 168:12-169:18. Marik contacted Bolasina the next day and received from Bolasina a
 copy of Way's report. *Id.* at 169:17-170:9. After further communications with Bolasina and discussions
 with two Assistant United States Attorneys, Marik informed Bolasina that no criminal case would be
 opened. *Id.* at 170:22-174:6; *see* Ex. 307.

1 answers.¹⁶ Having reviewed the complete dialogue, the Court understands plaintiff to be
 2 casting aspersions against Hanson for not telling Lenhart something that plaintiff said in a
 3 document, which was reviewed by Lenhart prior to interviewing plaintiff, and about
 4 which Lenhart and plaintiff specifically spoke before Lenhart issued her report. In other
 5 words, before reaching any findings or conclusions, Lenhart was fully aware of plaintiff's
 6 gripe that Hanson did not advise him he was under investigation. This evidence does not
 7 establish any omission by Hanson, let alone any discriminatory animus.

8 e. Conclusion

9 The Court agrees with plaintiff's counsel's premise that discrimination in our
 10 current era takes a different form than the racism of yesteryear. It is not as obvious and
 11 does not necessarily involve the use of racial slurs or other offensive language. It is also
 12 more difficult to prove. Nevertheless, proof is still required. In this case, in the Court's
 13 view, plaintiff relied primarily on innuendo and subterfuge rather than on evidence. The
 14 Court, however, acknowledges that a jury could assess the credibility of the witnesses

15
 16¹⁶ Plaintiff relies on the exchange between Jones and Lenhart beginning on page 110, at line 21, and
 17 ending on page 111, at line 13, of the transcript from March 22, 2013. See Resp. to Mtn. for JMOL at
 18 16 n.Y (docket no. 393). The cited colloquy is confusing and proves nothing. The subsequent discussion,
 19 however, provided clarity:

Q: Did you subsequently learn, during your investigation, that Donna Hanson had
 20 never told Chief Chen that he was under investigation?

A: If I recall correctly, that was a statement made in one of the documents prepared
 21 by Mr. Chen.

Q: That document, that comes after his termination; is that correct?

A: No, I'm not sure. I recall reading that there was an assertion on Mr. Chen's part
 22 that Ms. Hanson had never told him he was under investigation, that he had never been
 23 notified of that, because that is something I discussed with him during my interview with
 him.

Tr. (Mar. 22, 2013) at 111:14-25.

1 and weigh the evidence differently than the Court, and the Court has therefore previously
2 denied defendants' motion for judgment as a matter of law. In granting a new trial, the
3 Court does not prejudge whether another jury will reach a similar or different verdict;
4 however, the Court will more rigorously patrol plaintiff's counsel's conduct to prevent
5 her from infusing into a second trial the various contaminates that make upholding the
6 first verdict impossible.

7 **3. Affirmative Defense**

8 Even if plaintiff's evidence was sufficient to establish that race and/or national
9 origin was a substantial factor in the various adverse employment actions, the great
10 weight of the evidence supports the conclusion that defendants would have terminated
11 plaintiff on the basis of the wrongdoing alleged in the notice of discharge even if race
12 and/or national origin had played no role in the decision. In terminating plaintiff, Hanson
13 identified six non-discriminatory reasons for her decision: (i) making false statements to
14 both Bolasina and Lenhart; (ii) forging memoranda under the names of subordinates;
15 (iii) removing or destroying data on City-owned electronic equipment; (iv) improperly
16 using City funds for particular purchases; (v) improperly accessing the MX Logic system;
17 and (vi) losing the confidence of many of the employees of the Medina Police
18 Department. Ex. 385 (copy filed as Ex. GGG to Holt Del. (docket no. 158-7)).

19 With regard to the first basis enumerated in the notice of discharge, during trial,
20 plaintiff attempted to cast his statements to Bolasina as the product of a misunderstanding
21 about the nature and subject of their meeting. See Tr. (Mar. 14, 2013) at 81:3-86:12.
22 According to Bolasina, however, during the interview on December 15, 2010, Bolasina
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1 explicitly asked plaintiff whether Baker had given plaintiff a username and password for
 2 the e-mail archive, and plaintiff falsely denied receiving such information from Baker.
 3 Tr. (Mar. 19, 2013) at 65:12-18, 83:17-84:21, 88:15-89:18. Based on his belief that
 4 plaintiff lied to him, making him a witness in this matter, Bolasina was forced to
 5 withdraw as counsel for City of Medina. This fact belies any motive on Bolasina's part
 6 to fabricate, exaggerate, or embellish events. Moreover, the draft written statement that
 7 Bolasina contemporaneously e-mailed to plaintiff for review and signature corroborates
 8 Bolasina's recollection of events; if plaintiff had not made the representations
 9 memorialized in the draft, Bolasina would have had no purpose for sending it to plaintiff.
 10 The great weight of the evidence supports a finding that plaintiff made false statements to
 11 Bolasina.

12 Likewise, the Court is persuaded that the great weight of the evidence establishes
 13 plaintiff lied to Lenhart. Through his expert Marcella Fleming Reed, plaintiff attacked
 14 Lenhart's methodology, accusing her of not being independent and of not interviewing
 15 crucial witnesses.¹⁷ Tr. (Mar. 18, 2013) at 116:10-118:6. The first criticism was not
 16 based on any evidence, both Hanson and Lenhart having testified that Hanson did not in
 17 any way direct Lenhart's investigation, Tr. (Mar. 20, 2013) at 162:15-16, 178:6;
 18 Tr. (Mar. 22, 2013) at 49:20-22, 50:11-14, 55:12-16, and the second criticism lacked

20 ¹⁷ Over defendants' objection and despite the Court's admonishment about its prior rulings, plaintiff's
 21 counsel elicited from plaintiff testimony insinuating that Lenhart was biased by her familiarity with Eric
 22 Hokanson, an employee at a shop where Lenhart took her car for servicing. Tr. (Mar. 14, 2013) at 139:8-
Loudermill hearing, see Order at 7 n.2 (docket no. 251), plaintiff's challenge to Lenhart's impartiality is
 baseless and was inappropriately presented to the jury.

1 substance because Fleming Reed did not herself interview two of the three witnesses at
 2 issue and did not know what they might have contributed to the investigation,
 3 Tr. (Mar. 18, 2013) at 118:2-6, 124:22-125:11, and the third witness, Officer Emmet
 4 Knott, did not add much to the mix of information.¹⁸ The Court carefully observed
 5 Lenhart when she testified and found her to be extraordinarily professional and credible.
 6 The Court reviewed Lenhart's report and found it to be well-crafted and thorough. Most
 7 of the individuals Lenhart interviewed during her investigation testified at trial, and the
 8 Court found no reason to doubt the veracity of any of these witnesses. Thus, the Court
 9 takes particular note of Lenhart's observation during cross-examination that this case was
 10 unusual because she had never before interviewed a witness who she "felt was lying as
 11 much as Mr. Chen." Tr. (Mar. 22, 2013) at 139:7-9.

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¹⁸ As to certain statements and actions attributed to Yourkoski, Knott's trial testimony was merely cumulative. His testimony that he would have told Lenhart that Yourkoski was "capable of lying in a report, in a statement under penalty of perjury," Tr. (Mar. 18, 2013) at 89:7-8, and the specific instance of alleged misconduct that Knott recounted, *see id.* at 89:10-91:25, was improper impeachment of Yourkoski that would have been excluded had an objection been made. *See* Fed. R. Evid. 404(b) & 608(b). The Court does not view these aspersions Knott might have cast against Yourkoski if interviewed by Lenhart as diminishing the thoroughness or reliability of Lenhart's investigation; Lenhart is an attorney who is presumably familiar with the principles underlying the evidentiary rules governing the manner in which credibility may be impugned. With regard to the four MP-5 select-fire submachine guns costing \$2,000 each, which were purchased by plaintiff with City of Medina funds, Knott agreed that the Medina Police Department has never deployed them during a call or an incident. Tr. (Mar. 18, 2013) at 101:4-5, 101:17-20, 102:4-8. Finally, Knott's testimony about training request memoranda signed by Yourkoski, *see id.* at 80:20-82:19, 107:20-108:23, did nothing to establish a custom at the Medina Police Department of officers authoring memoranda on behalf of others. Rather, the memoranda speak for themselves, and they reflect that Yourkoski signed or drafted each memorandum on his own behalf as either making or authorizing the training request for or of another officer. *See* Ex. 1071.

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Without disputing that he engaged in the other conduct on which Hanson based his discharge, namely creating memoranda on behalf of subordinates without their consent,¹⁹ deleting electronic data in which the public might have an interest, spending City funds in a questionable manner,²⁰ and using Baker's identity and password to access the MX Logic system, plaintiff offered what he believed to be innocent explanations for these various actions.²¹ Defendants, however, presented multiple witnesses who testified

¹⁹ In contrast to Yourkoski's legitimate training memoranda, plaintiff's improper memoranda, which he acknowledged crafting, *see* Tr. (Mar. 15, 2013) at 83:9-19, were written as though they had been generated by another officer and then circulated to him. For example, Sergeant John Kane testified that, after being asked by Bolasina about the purchase of three iPod Touches with City of Medina funds, he discovered related memoranda, ostensibly from Kane to plaintiff, that Kane did not write and did not authorize anyone to write on his behalf. Tr. (Mar. 22, 2013) at 13:21-14:22, 18:7-19:4. Similarly, Officer Michael Girias learned that a memorandum concerning the voiding of a ticket, which was addressed to plaintiff, had been generated as though it came from him. Tr. (Mar. 21, 2013) at 149:24-150:15. At trial, Girias explained that sending a memorandum of this nature directly to plaintiff was not consistent with protocol, but rather such matter would ordinarily be worked up through the chain of command, and the memorandum incorrectly indicated that, at the time the memorandum was created, the ticket had not left Girias's possession, when in fact Girias had already turned in the ticket for processing. *Id.* at 154:8-18, 169:15-170:3. With regard to both memoranda, Lenhart testified that, when she interviewed plaintiff, he told her Kane and Girias were the respective authors; Lenhart indicated at trial she was unaware that plaintiff later admitted he in fact created the memoranda. Tr. (Mar. 22, 2013) at 74:3-13, 75:19-76:4. Plaintiff's confession was made in response to Lenhart's report, along with the explanation that "[t]his is a common business practice in police departments where the supervisor will craft a memo in the name of the subordinate." Ex. 376 at 30 (copy filed as Ex. DDD to Holt Decl. (docket no. 158-7)). Plaintiff's assertion of "common practice" is belied by his previous false statement to Lenhart, denying that he fabricated the memoranda at issue. If plaintiff's conduct was indeed consistent with Medina Police Department standards, plaintiff presumably would not have felt the need to hide it from Lenhart.

²⁰ The expenditures of concern included two "North Face" jackets, described by plaintiff to Director of Finance Nancy Adams as being under evaluation for use by patrol officers, but both jackets were size medium, which was inconsistent with the explanation because most of the officers would need a large or extra large. Tr. (Mar. 20, 2013) at 125:17-126:11. At trial, plaintiff indicated that he himself wore either the lighter or heavier "North Face" jacket, depending on the weather, to and from work. Tr. (Mar. 15, 2013) at 85:7-17. Although Lenhart's report identified other suspicious purchases, including knives, automatic machine guns, and supplemental oxygen containers, *see* Ex. 1074, Hanson did not rely on those allegations in discharging plaintiff, *see* Ex. 385, and the time used during trial by plaintiff's counsel exploring whether these items were returned to or later located at the Medina Police Department was misspent.

²¹ At trial, plaintiff explained that he accessed the MX Logic system for the purposes of reviewing e-mails to determine whether or not they should be disclosed in response to public records requests, investigating

1 that this behavior was a breach of protocol and inconsistent with the expectations of a
 2 chief of police. One witness, Sergeant Kane, summed up matters by indicating that, if
 3 plaintiff were reinstated, he would immediately submit his resignation, Tr. (Mar. 22,
 4 2013) at 19:7-9, and two other witnesses, Officer Girias and Officer James Martin,
 5 indicated that they would not work for plaintiff again, Tr. (Mar. 21, 2013) at 160:7-16; *id.*
 6 at 138:2-7.

7 To reach the conclusion that defendants failed to prove by a preponderance of the
 8 evidence that they would have made the same decision to terminate plaintiff even if race
 9 and/or national origin had played no role, the jury had to disregard the testimony of two
 10 independent investigators, the City Manager, the City Clerk, the Director of Finance, and
 11 at least four members of the Medina Police Department. The jury might have been
 12 persuaded by plaintiff's counsel inappropriate statement at the beginning of her rebuttal
 13 indicating that “[a] case doesn't get to federal court unless a case exists,” Tr. (Mar. 25,
 14 2013) at 62:22-23, or by some other appeal to passion or prejudice, but regardless of what
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16 alleged leaks of information, and obtaining his own messages when the e-mail system was down.
 17 Tr. (Mar. 14, 2013) at 66:17-67:9. At the summary judgment stage, plaintiff provided entirely different
 18 reasons for using the MX Logic system, namely to gather “records relevant to ongoing 2011 budget
 19 preparations” and to “conduct a regular review of officer communications.” Chen Decl. at ¶ 66 (docket
 20 no. 191). Plaintiff’s change of rationale, apparently in response to the Court’s dismissal of his
 21 “whistleblower” claims, *see* Order (docket no. 251), is troubling, but regardless of what grounds plaintiff
 22 claims to have had for reading the e-mails of other individuals, plaintiff’s use of an identity and password
 belonging to another employee is strong evidence that his access was improper. Moreover, unlike Fischer
 and Kane, who candidly acknowledged accessing the MX Logic system, the former for an inappropriate
 purpose and the latter at plaintiff’s direction, *see supra* note 4; Tr. (Mar. 22, 2013) at 35:7-36:10, plaintiff
 denied even possessing the very username and password that he had given to Kane. Had plaintiff actually
 believed his use of the MX Logic system was authorized, he presumably would not have felt compelled to
 conceal information about such access from Bolasina. Indeed, at trial, plaintiff acknowledged that he had
 been cautioned by Kane that he “could get fired for snooping into e-mail archives.” Tr. (Mar. 15, 2013)
 at 94:12-18.

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1 improperly swayed the jury, its verdict bears no correlation to the great weight of the
2 evidence, and the Court concludes that defendants are entitled to a new trial at least with
3 regard to their strong “same decision” defense.

4 **4. Conclusion**

5 Having considered all of the evidence and the credibility of the witnesses, the
6 Court is left with “the definite and firm conviction that a mistake has been committed”
7 with respect to the jury’s verdict on liability as to plaintiff’s discrimination claims. This
8 ruling also calls into doubt the verdict on liability as to the substantive due process claim,
9 as to which the jury was instructed that, if it found Hanson’s action was based solely on
10 race or national origin, it must conclude that Hanson’s action was arbitrary and lacking a
11 rational basis. Instr. No. 15 (docket no. 321). Likewise, the jury’s verdict concerning
12 punitive damages cannot stand. Defendants are entitled to a new trial on all of plaintiff’s
13 claims.

14 **B. Excessive Verdict**

15 The Court must apply state law in determining whether damages awarded on a
16 state law claim are excessive. *Cosby v. AutoZone, Inc.*, 445 Fed. Appx. 914, 916 (9th
17 Cir. 2011). In Washington, courts are authorized by statute to order a new trial if “the
18 damages awarded by a jury . . . [are] so excessive or inadequate as unmistakably to
19 indicate that the amount thereof must have been the result of passion or prejudice.”
20 RCW 4.76.030. In addition to “passion or prejudice,” Washington courts recognize as
21 grounds for a new trial that the damages either “are outside the range of substantial
22 evidence in the record” or “shock the conscience of the court.” *Green v. McAllister*, 103

1 Wn. App. 452, 462, 14 P.3d 795 (2000). Under Washington law, a court may, as an
2 alternative to a new trial, reduce a jury's damages award, but only with the plaintiff's
3 consent. RCW 4.76.030; see Green, 103 Wn. App. at 462. In addition, Washington
4 courts are permitted to order a new trial on damages only, leaving the jury's liability
5 determination intact. Id. (citing Wash. Civ. R. 59(a)).

6 Plaintiff's expert, Robert W. Moss, testified via perpetuation deposition that, if
7 plaintiff did not work from the time of trial until the end of his worklife expectancy,
8 estimated to be another 13.2 years, the present value of front pay, including wages and
9 benefits, would total \$1,650,000. Moss also testified that the scenario of plaintiff not
10 working again until the end of his worklife expectancy was "highly unlikely" and had "a
11 very low probability." Moss also performed calculations on the assumption that plaintiff
12 would find employment in law enforcement or a related field within the next six months,
13 starting at seventy percent (70%) of his prior salary and increasing faster than average
14 over the next five years to the level he would have been earning had he remained at City
15 of Medina. Using this model, Moss arrived at a front pay figure of \$270,900. Moss
16 described this outcome as one of the two "most probable" for plaintiff. The other "most
17 probable" outcome about which Moss testified involved plaintiff obtaining employment
18 outside the law enforcement field, earning the same amount as a person who holds a
19 bachelor's degree, which was estimated at \$65,000 per year plus benefits. For this
20 hypothetical, Moss derived a front pay amount of \$700,675. He described this scenario
21 as "the single highest likelihood," reflecting "a serious long-lasting impact on [plaintiff's]
22 employment potential and ability to work in his chosen field."

1 The jury's award of \$1.65 million in front pay on the WLAD claim is unsupported
2 by the evidence. The assumption underlying the jury's calculation, namely that plaintiff
3 will never work again, bears no relationship to reality. Plaintiff is educated and able-
4 bodied and his own expert testified that he could likely find employment outside the law
5 enforcement field, earning the same amount as a typical college graduate. The jury might
6 have been swayed by plaintiff's counsel's argument that "[f]ront pay is \$1,650,000. And
7 again, it was never contested," Tr. (Mar. 25, 2013) at 36:19-20, but a lawyer's statement
8 is not evidence, *see* Instr. No. 5 (docket no. 321), and the jury had a duty to award only
9 those damages proven by plaintiff by a preponderance of the evidence, *see* Instr. No. 16.
10 The jury's excessive award is also an indication that the jury was influenced by Jones's
11 improper comments during opening statement and other breaches of the Court's rulings
12 in limine and/or by passion or prejudice in reaching its decision on liability, and the Court
13 is satisfied that a remittitur of the front pay award or a new trial solely on damages for the
14 state law discrimination claim does not provide a sufficient remedy. Defendants are
15 entitled to a new trial on liability and damages as to both federal and state law claims.

16 **C. Attorney Misconduct**

17 To warrant a new trial, attorney misconduct must "sufficiently permeate an entire
18 proceeding to provide conviction that the jury was influenced by passion and prejudice in
19 reaching its verdict." *Kehr v. Smith Barney, Harris Upham & Co.*, 736 F.2d 1283, 1286
20 (9th Cir. 1984). In deciding whether to grant a new trial, the Court may consider the
21 nature of the improper comments, their frequency, and their relevance to the issues before
22 the jury, *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1193 (9th Cir. 2002), as well as
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1 whether the offending behavior occurred principally during opening and/or closing
2 statements, which the jury in this case was instructed does not constitute evidence,
3 Instr. No. 5 (docket no. 321), as opposed to throughout the course of the trial, *Kehr*, 736
4 F.2d at 1286. The Court may also analyze whether opposing counsel timely objected,
5 requested a curative instruction, or moved for a mistrial, while bearing in mind the
6 potentially antagonizing effect on the jury of frequent objections. *Id.*; *see Anheuser-*
7 *Busch*, 69 F.3d at 346; *see also Hemmings*, 285 F.3d at 1193 (applying the plain error
8 standard to a claim of improper closing argument that was raised for the first time after
9 trial). Moreover, the Court may take into account the strength of the offending party's
10 case, *see Hemmings*, 285 F.3d at 1195, and whether the jury's award of damages was
11 excessive, *see Kehr*, 736 F.2d at 1286.

12 The irregularities in the trial of this matter began right after Jones began delivering
13 her opening argument on plaintiff's behalf. Prior to trial, defendants successfully moved
14 to exclude discriminatory statements that could not properly be imputed to either Hanson
15 or City of Medina, including Knapp's "Charlie Chan," "smiling Chinaman," and "cotton-
16 picking" remarks, Skinner's "Asians don't make good managers" comment, Biglow's
17 "Harry Potter" parody, Paulman's stated refusal to "talk to Orientals," and Jordan's
18 observation about Asians having "small ones." *See* Def.'s Mtns. in Limine (docket
19 no. 204); *see also* Minute Orders (docket nos. 239 & 265). Despite the Court's explicit
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1 orders in limine,²² during the first few minutes of opening argument, Jones managed to
 2 violate the bulk of them, repeating the “Charlie Chan” statement three different times,
 3 Tr. (Mar. 11, 2013) at 6:5, 9:25, 11:1, the “smiling Chinaman” comment twice, *id.* at
 4 10:1-2, 11:2-3, and the “cotton-picking” remark with commentary, *id.* at 10:4-7, telling
 5 the jury about Skinner’s, Paulman’s, and Jordan’s²³ excluded statements, *id.* at 10:18-20,
 6 11:5-6, 12:9-10, and attacking Yourkoski for repeating Knapp’s comments, *id.* at 10:21-
 7 11:3.²⁴ Jones also attributed to Biglow the statement that “Asians can’t be trusted,” *id.* at
 8 7:11, and attempted to introduce other remarks by Biglow before the Court interceded, *id.*

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²² Jones’s contention that the Court’s rulings were somehow unclear is not well taken. The Court’s Minute Orders, docket nos. 239 and 265, exactly tracked the sequence of defendants’ motions in limine, using the same letters and brief summaries to identify each motion. For example, defendants’ motion in limine “A,” which sought to exclude testimony or evidence “regarding alleged discrimination, hostile work environment, or a ‘culture of racial bias and discrimination’ directed at persons other than plaintiff,” was unequivocally granted. Minute Order at ¶ (2)A (docket no. 239). The motion itself described in detail the specific statements to be excluded. *See* Def.’s Mtns. in Limine at 5 (docket no. 204). No reasonable attorney could fail to understand that the comments enumerated in defendants’ motion in limine “A” were not to be repeated to the jury. Moreover, to the extent that Jones was confused or uncertain, she had ample time and opportunity to seek clarification about the Court’s orders in limine outside the presence of the jury, but she never did so.

²³ Also in violation of the Court’s in limine rulings, and in response to prompting by Jones, plaintiff testified that Jordan described his own father as “the biggest racist that ever walked this planet.” Tr. (Mar. 14, 2013) at 175:22-177:1. The jury was told to disregard this evidence, which had no relevance to the issues in this case, and the jury is assumed to have complied with this instruction, but the Court has considered this exchange as an example of the misconduct that permeated this trial.

²⁴ During closing argument, Jones improperly imputed Yourkoski’s comments to Hanson, stating:

For years Lieutenant Yourkoski repeated to Chief Chen the racial slurs that he heard first from Chief Knapp. . . . Lieutenant Yourkoski testified that to date he has not been disciplined for this. And we all know who it is that permits this behavior to continue in the city. The one at the helm, the City Manager.

Tr. (Mar. 25, 2013) at 19:21-20:5. Plaintiff, however, presented no evidence that he ever complained to Hanson about Yourkoski’s alleged taunting or that Hanson had any knowledge about it. Moreover, plaintiff, and not Hanson, was Yourkoski’s immediate supervisor, and plaintiff had both the authority and the responsibility for disciplining Yourkoski if such improper behavior was in fact taking place. Jones’s suggestion otherwise in her closing remarks was inappropriate.

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1 at 10:8-16.²⁵ Defendants timely objected to the majority of Jones's violations of the
 2 Court's rulings, putting defendants at the outset of trial in the unenviable position of
 3 appearing to the jury as if they were hiding information, but they had no success in
 4 corralling Jones's opening argument.

5 During the course of trial, Jones further defied the Court's orders in limine by
 6 eliciting testimony from experts about opinions that were based on evidence the Court
 7 had ruled was inadmissible. In particular, Wilson Edward Reed stated his belief that
 8 certain "slurs took an impact on [plaintiff] as a professional," and when asked what slurs
 9 or facts he was referencing, Reed erroneously attributed to Hanson the statement, "You
 10 cannot trust a smiling Chinaman." Tr. (Mar. 20, 2013) at 40:18-42:7. Defendants
 11 objected, indicating that the remark had been made by former Chief Knapp in 2003, and
 12 the jury was instructed to disregard the testimony. *Id.* at 42:11-14. Reed, however, later
 13 volunteered in response to Jones's request to provide an example of an "old school"
 14 statement by Hanson:

15 The racial slurs that I observed around Thanksgiving and, "Do you
 16 celebrate Thanksgiving," and "Do you eat turkey?" This stuff is old-

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 18 ²⁵ Jones also tried to elicit testimony about Biglow's "Harry Potter" style e-mail by asking, "In 2008, what
 19 council member made a racially disparaging comment?" Tr. (Mar. 18, 2013) at 37:9-10. In response, the
 20 witness, Shawn Whitney, identified City Council member Lucius Biglow, and defendants objected to
 21 further inquiry. *Id.* at 37:11-14. During the ensuing colloquy, Jones managed to misinform the jury that
 22 Biglow's remark was "specifically about Chief Chen," *id.* at 38:1-3, and to misrepresent to the jury that
 23 "[w]e already have a ruling that it's allowed," *id.* at 38:18-19. Both the phrasing of Jones's question to
 24 Whitney and Jones's subsequent editorial put defendants in an untenable position. The evidence was
 25 excluded because Biglow was censured for his behavior, because the incident, as well as the discipline,
 occurred before Hanson became city manager, and because Biglow's parody did not involve and was not
 aimed at plaintiff. By ignoring the Court's clear and explicit ruling deeming this evidence inadmissible,
 Jones was able to impute to defendants an offensive statement that is not attributable to them as a matter
 of law before defendants could even launch an objection.

1 school. It's old-school racism, 25 or 30 years old. And my opinion is
2 it's latent, it's been dormant for years, and this is coming from stakeholders,
3 the gatekeepers in the community that want to keep the status quo.”

4 *Id.* at 50:17-23. Defendants objected as soon as they could, but the bell had already rung.

5 *Id.* at 50:24-25. In this manner, despite the Court’s previous rulings, Reed effectively
6 connected Hanson to, and inappropriately made her responsible for, the offensive conduct
7 of predecessors and community members.

8 In addition, Norman Stamper, a former chief of police, was asked by Jones to
9 describe the facts on which he relied “with respect to race issues” between plaintiff and
10 City of Medina. Tr. (Mar. 21, 2013) at 87:24-25. Defendants objected to this line of
11 inquiry both before and after this exact question was posed, on the grounds that plaintiff
12 had already called an expert on discrimination in the workplace and that the question as
13 framed was overbroad. *Id.* at 86:13-14, 88:1. Based on Jones’s representation that the
14 subject of Stamper’s testimony somehow differed from the topics covered by plaintiff’s
15 other expert, Jones was permitted to press forward. *See id.* at 86:24-87:23. Stamper then
16 indicated that he “counted eight or nine instances of what [he] would consider to be
17 unambiguously racially charged anti-Asian sentiment being expressed within the city,
18 from both the community and government.” *Id.* at 88:3-6. The Court concluded that,
19 contrary to Jones’s assertion, Stamper’s testimony was indeed cumulative. *Id.* at 88:9-13.
20 Jones persisted by asking to provide an offer of proof. *Id.* at 88:14-15. This colloquy is
21 particularly troubling because, not only did Jones lack a good faith basis for asserting that
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1 Stamper's testimony was not duplicative, she had no colorable argument that the eight or
2 nine instances to which Stamper referred constituted admissible evidence.

3 At oral argument on the pending motion for a new trial, defendants' counsel
4 postulated that, given the weakness of plaintiff's case, the jury rendered a verdict in
5 plaintiff's favor only because it was improperly influenced by Jones's misconduct. The
6 Court declines to reach so sweeping a conclusion, but agrees with the basic premise that
7 Jones's behavior must be viewed through a lens that also considers the weakness of
8 plaintiff's case on liability and the excessiveness of the jury's award of front pay on
9 plaintiff's state law discrimination claim. In light of the evidence that was properly
10 before the jury, the Court concludes that plaintiff's counsel's misconduct had an
11 inappropriate effect on the jury's decision. The discriminatory remarks Jones paraded
12 before the jury during her opening statement and about which she elicited testimony from
13 plaintiff and his experts during trial were excluded precisely because defendants in this
14 matter, City of Medina and Donna Hanson, cannot be held liable on the basis of such
15 comments. By continually intimating to the jury that racial animus on the part of
16 defendants was demonstrated by the offensive conduct of individuals who were either
17 disciplined for the behavior or disconnected from defendants by the passage of time or a
18 lack of privity, Jones converted an extraordinarily weak case of discrimination into a
19 \$2 million verdict, the bulk of which is unsupported by the evidence. Defendants are
20 therefore entitled to a new trial.

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1 **Conclusion**

2 For the foregoing reasons, the Court ORDERS:

3 (1) Defendants' motion for a new trial, docket no. 361, is GRANTED;

4 (2) The Verdict, docket no. 325, Findings of Fact and Conclusions of Law,

5 docket no. 344, and Judgment, docket no. 345, are VACATED;

6 (3) Plaintiff's motion for costs, docket no. 350, and motion for attorney fees,

7 docket no. 365, are STRICKEN without prejudice;

8 (4) The parties are DIRECTED to file a Joint Status Report within twenty-eight

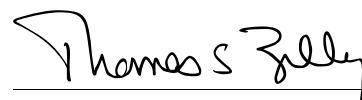
9 (28) days of the date of this Order concerning when they anticipate being ready for retrial

10 of this matter; and

11 (5) The Clerk is DIRECTED to send a copy of this Order to all counsel of

12 record.

13 Dated this 23rd day of August, 2013.

14 
15 THOMAS S. ZILLY
16 United States District Judge